SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 212

CARLOS OVERTON,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI

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Opinions Below

The decision of the Court of Special Sessions is unreported and appears in the Record at pp. 214-16. It is set forth in the Appendix, *infra,* pp. 19-21. The opinion of the Appellate Term is reported at 51 Misc. 2d 140 (1966) and appears in the Record at p. 242. It is set forth in the Appendix, *infra,* p. 18. The opinion of the New York Court of Appeals is reported at 20 N. Y. 2d 360 (1967), and is set forth in the Appendix, *infra,* pp. 13-17.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 7, 1967 and the case remanded to the Appellate Term, which affirmed the conviction without opinion on March 22, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Questions Presented

1. Whether a school official consented to a police search of a student's locker where he acquiesced to the search only after being shown a seemingly valid search warrant.

2. Whether a school official has authority under the Fourth Amendment to consent to a police search of a high school student's locker and of the coat locked inside it.

Statement of the Case

On December 21, 1964 police officers came to Mount Vernon High School (R. 45, 100) with a search warrant authorizing them to search the school lockers and the cars owned by the parents of petitioner and of one Cabell, as well as petitioner's person, his apartment, and the grounds of the Mount Vernon High School, where petitioner and Cabell were both students (R. 9-10). The police were authorized to search for marijuana believed to be unlawfully possessed by petitioner (R. 9). The police showed the warrant to Dr. Adolph Panitz, the vice-principal (R. 57), who then led them to petitioner and Cabell, who were in the school lunchroom (R. 46). The police directed petitioner

and Cabell to come with them (R. 62, 63), and took them to the vice-principal's office (R. 64). In the office, petitioner was informed of the warrant and subjected to a search of his person, which yielded no evidence (R. 64, 66, 101, 115-117, 141-42). The police and the vice-principal then took petitioner (R. 47, 142) to the school locker assigned exclusively to him (R. 39, 77, 78, 92). The vice-principal opened the locker, which contained a coat (R. 78-79, 104). After petitioner, in response to a police question (R. 120), identified the coat as his own (R. 104, 120), one of the policemen removed it from the locker, searched through its pockets (R. 77-80, 120-121), and discovered four marijuana cigarettes (R. 104, 121).

The vice-principal's motives for cooperating in the search are not clear. At one point he asserted that "if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker" (R. 93). But he also made it clear that he was acquiescing to the authority of the search warrant. When questioned concerning his taking the police to petitioner (R. 58), going to the locker (R. 75), and opening it (R. 78), the vice-principal replied that he was honoring the search warrant (R. 75). The vice-principal also agreed that he "believed the search warrant was a valid and legal document" (R. 76).

Petitioner was charged with possession of marijuana (R. 4). The constitutional questions presented were raised by the petitioner in counsel's affirmation statement in support of the Motion to Suppress Evidence (R. 18). On March 19, 1965, after a hearing on suppression of the evidence, the Court of Special Sessions vacated the search warrant [as it had earlier ruled it would (R. 33-34)] be-

cause none of the affidavits in support of the warrant gave grounds to believe that there was any evidence in the school locker. Nevertheless, the Court denied the motion to suppress because the principal had "retained dominion over the use of the lockers" rendering "the search legal" (R. 215-216). Petitioner, who was 17 years old, thereupon pled guilty to an information charging him as a youthful offender and was sentenced to indeterminate probation (R. 227-229), which may run, at the discretion of the court, up to five years. On appeal the constitutional questions were raised again in petitioner's Affidavit of Errors (R. 230-239), and the Appellate Term, Second Department, reversed and dismissed the charge, holding that, "The search was illegal and cannot be justified upon the theory of consent on the part of the vice-principal . . . . Defendant had the exclusive use of the locker in question and the purported consent to search it was not binding upon him" (App., *infra,* p. 18). Thereupon the State appealed, and a divided New York Court of Appeals reversed the Appellate Term, holding that the vice-principal had power to consent to the search consistent with the Fourth Amendment (App., *infra,* p. 14). Judge Bergen, for himself and Chief Judge Fuld, dissented on the ground that the principal's consent to the search was in part compelled by the invalid search warrant and that "this invalid compulsion under a bad search warrant was as much an invasion of defendant's rights as if the police, under the purported authority of the warrant, had broken the door of the locker or compelled the defendant himself to open it" (App.; *infra,* p. 16). The Court of Appeals remanded the matter to the Appellate Term for consideration of other matters not decided prior to appeal. Petitioner's conviction was thereafter affirmed by the Appellate Term without opinion.

Reasons for Granting the Writ

1. The purported consent was induced by the search warrant and was therefore not freely given. The state has conceded that "the search warrant was properly vacated .... We also acknowledge that a search of the locker by the police alone would be invalid without a warrant" (Brief for Appellant in the Court of Appeals, p. 4). But the court found that the search was valid because the vice-principal had consented to it. The court's decision that one presented with a search warrant which he assumes to be valid may nevertheless be said to have freely consented to the search it purports to authorize raises serious Fourth Amendment questions and is in plain conflict with this Court's decision in *Bumper* v. *North Carolina,* 36 U. S. L. Week 4513 (June 3, 1968).

It is clear that the police officers relied on the search warrant. Officer Pappas testified that petitioner "was searched with the search warrant which gave us permission to search that locker" (R. 123). Their opinion was shared by the vice-principal, who agreed that he was "honoring the search warrant" when he led petitioner and the police to the lockers and opened petitioner's locker, as well as when he first took the police to petitioner (R. 58, 75, 78). At the time of the search, then, all the parties believed that the search was compelled and authorized by the warrant.

The state's contention that the vice-principal acted in spite of the warrant must be viewed in light of this Court's rulings regarding knowing waiver. Where constitutional rights are involved, this Court has stressed that waiver must "truly be the product of . . . free choice," a choice which is made "knowingly and competently." *Miranda* v.

Arizona, 384 U. S. 436, 458, 465 (1966). More precisely, "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). See *Amos* v. *United States,* 255 U. S. 313 (1921); *Johnson* v. *United States,* 333 U. S. 10 (1948); *Gatlin* v. *United States,* 326 F. 2d 666 (D. C. Cir., 1963); *Waldron* v. *United States,* 219 F. 2d 37 (D. C. Cir., 1955). Where it is "petitioner's constitutional right which was at stake . . . and not the [vice-principal's]", this Court has viewed consent with special strictness. *Stoner* v. *California,* 376 U. S. 483, 489 (1964).

In *Bumper* v. *North Carolina, supra,* this Court settled the precise question at issue here. Defendant's grandmother admitted police to her home after they informed her that they had a search warrant. There was testimony that she willingly let the police in, but this Court announced the rule that when " 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant [w]e hold that there can be no consent under such circumstances." 36 U. S. L. Week at 4515. The Court's rationale for the rule is distinctly applicable here:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Ibid.*

The *Bumper* rule should be reaffirmed in this case.

The court below passed over the consent issue on the theory that the vice-principal would have had no reason to resist the search and would in fact be obligated "to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated." App., *infra,* p. 15. But whether or not a school has such an obligation, it has an equally important duty to protect its students from unreasonable searches. To assume that consent would have been granted in this case is to ignore the fact that the school can refuse to allow a search where, for example, police demand to make a search without a warrant. If the retrospective consent approved by the court below is allowable because there is a duty to consent even to an unreasonable search, then school officials are to be denied any discretion in protecting the rights of students under their supervision.

Moreover, a finding of valid consent in this case would weaken the force of the warrant as a dependable instrument which can be relied upon to relieve a citizen of personal responsibility for a search. A search warrant is intended to be obeyed, and the vice-principal quite properly aided the police in their search. But what should he have done had he understood that his aid and acquiescence would later be interpreted as consent to the search? He might well not have cooperated. Under such circumstances, his lack of

cooperation would have been prudent. For the warrant might be vacated and the search ruled improper, though he independently consented to it. A school principal responsible for the protection of his students cannot be deemed privileged to accede to every request a policeman makes. The function of the warrant is to make precise the legal boundaries of a search. To permit the vice-principal's cooperation to do service for informed consent therefore undercuts the power and function of the search warrant and unjustifiably extends the force and meaning of consent. *Bumper* should be reaffirmed here to protect both the viability of the warrant as a reliable authorization to search and the rights of an individual against consent given after presentation of a warrant—a "situation instinct with coercion." *Bumper* v. *North Carolina, supra,* at 4515.

2. This case also presents an important Fourth Amendment question of the scope of the privacy against searches by the police to which a student is entitled while at school. Defendant's right to be free from unreasonable searches and seizures was violated by the New York court's ruling that the right could be waived by the vice-principal.

That the locker was a private place is clear from the record. Each student had the exclusive use of his locker during the school year, and the lockers could be locked, as petitioner's was (R. 77). Search of the locker without valid consent would have been illegal, as respondent conceded in its brief in the court below, *supra.*

This Court has been sensitive to the necessity for privacy from police intrusions, even in situations where privacy is otherwise limited. In *Stoner* v. *California, supra,* the consent of a night clerk was held insufficient justification for a search of defendant's hotel room, even though there was

"'implied or express permission' to [certain persons] . . . to enter his room 'in performance of their duties.'" *Id.* at 489. While the clerk had a right to enter, this right was for certain purposes related to his duties only and was not freely transferable to the police at the "unfettered discretion" of the night clerk. *Id.* at 490. See *United States* v. *Jeffers,* 342 U. S. 48 (1951); *Chapman* v. *United States,* 365 U. S. 610 (1961).

Similarly, in *United States* v. *Blok,* 188 F. 2d 1019 (D. C. Cir., 1951) consent by a government supervisor to search an employee's desk, over which the supervisor clearly had some authority but which was assigned exclusively to the employee, was held not binding on the employee:

> We think appellee's exclusive right to use the desk assigned to her made the search of it unreasonable. No doubt a search of it without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use. But . . . the search that was made . . . was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed. 188 F. 2d at 1021.

See *Holzhey* v. *United States,* 223 F. 2d 823 (5th Cir., 1955); *Reeves* v. *Warden,* 226 F. Supp. 953 (D. Md., 1964).

This Court has recognized that there may be a limited official power to search an area for certain reasons without there being a general power to make a criminal search. Standards for administrative searches by municipal building inspectors have recently been raised virtually as high as standards for criminal searches. *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *See* v. *City of Seattle,* 387

U. S. 541 (1967). It would be anomalous to permit in this case a *lowering* of standards for a criminal search because a right to conduct an administrative search may exist. Indeed, this Court made plain in *Abel* v. *United States,* 362 U. S. 217, 226 (1960) that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." A housing inspector may not by virtue of his power to enter a building admit a policeman searching for evidence of crime. The search at issue here was not a mere search for school purposes but a search by the police for evidence of crime for which a warrant had been issued.

Granting *arguendo* that school officials have supervisory power which may extend to inspection of lockers for certain purposes, what is at stake here is the distinction between inspection of the locker by school officials for school purposes and a criminal search by police. Even if school officials may look for violations of school rules or unsanitary conditions, it may not transfer that right to police searching for evidence of crime. See Knowles, *Crime Investigation in the Schools: Its Constitutional Dimensions,* 4 J. Fam. Law 151 (1964). Compare *Moore* v. *Student Affairs Committee,* 36 L. Week 2750 (M. D. Ala., May 14, 1968) (searches by school officials permissible when non-criminal proceeding will result); *Madera* v. *Board of Education,* 386 F. 2d 778 (2d Cir., 1967), *cert. den.* 36 L. W. 3404 (April 22, 1968) (standard for due process in school hearing depends on seriousness of consequences resulting from hearing).

The power of the vice-principal to consent to the search is even more clearly lacking here because the search was not confined to an inspection of the locker but included a search

of petitioner's coat. Even under its authority to control school premises, school authorities cannot be permitted at will to allow the search of the person or personal effects of its students. Courts have distinguished between the power to consent to the search of a room and the power to consent to the search of the personal effects within the room. *Reeves* v. *Warden, supra; People* v. *Egan,* 58 Cal. Rptr. 290 (1966); *State* v. *Evans,* 45 Hawaii 622 (1962); *U. S.* v. *White,* 268 F. Supp. 998, 1002 (D. D. C., 1966); cf. *Maxwell* v. *Stephens,* 348 F. 2d 325 (8th Cir., 1965) (dissenting opinion). If petitioner had been wearing his coat it would clearly have been protected from a search without a warrant in these circumstances. Though he had to take his winter coat off inside the school, petitioner kept it as private as he could by putting it in his locker. This Court should not accept the lower court's rule that a student in school cannot keep his private belongings private, especially when, as here, no overriding school purpose has been shown as to the coat. Particularly where criminal charges may result, the school should not be held to have the same power over the personal effects of its students as it does over school premises.

The New York court below rested its decision largely on the broad supervisory power of the school. But the teaching of *In re Gault,* 387 U. S. 1, 13 (1967), that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," indicates the limits of this power. If the guarantee against unreasonable searches and seizures "marks the right of privacy as one of the unique values of our civilization," *McDonald* v. *United States,* 335 U. S. 451, 453 (1948), it is unthinkable that minors while attending school could forfeit these rights and thereby suffer criminal penalties. One does not waive his rights to due process by going to

school. *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir., 1961), *cert. denied*, 368 U. S. 930 (1961); *Wasson* v. *Trowbridge*, 382 F. 2d 807 (2d Cir., 1967); *Knight* v. *State Board of Education*, 200 F. Supp. 174 (M. D. Tenn. 1961). While petitioner was subject to supervision by the school, he retained his rights against outside authorities which the school could not waive for him or force him to waive.

If the school is to perform its educational function properly, it must be given authority over what goes on in the classroom. But where a school official attempts to delegate his authority to the police, the school's broad discretion in teaching matters should not obscure the fact that what are at stake are individual rights against a search for evidence of crime.*

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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